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OCTOBER TERM, 1952.

No. 468

LAURA K. ERNST,

Petitioner,

vs.

JEWEL TEA CO., INC., D/B/A
JEWEL FOOD STORES,

Respondent.

REPLY OF LAURA K. ERNST TO BRIEF OF JEWEL TEA CO., INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

The lengthy brief of Jewel Tea Co. apparently is designed to mislead this Court into believing that this case is complex and involved, both as to the law and as to the facts—and thereby defendant attempts to induce this Court to consider the petition for certiorari as just another written petition by just another losing plaintiff in just another personal injury case.

This is not the truth.

The truth is this was a simple negligence case involving the sole question whether a certain electric eye door was safe for use by a lady almost 80 years of age, in

which District Judge Perry, after seeing the witnesses, ruled for plaintiff, on the facts. The law of the case clearly supported the judgment.

Plaintiff testified unequivocally that she was struck by the door at the threshold (Tr. 158, 160). Judge Perry distinctly found plaintiff told the truth (Tr. 255).

Defendant's only witness, its store manager Bickel, testified that he found the plaintiff out on the sidewalk (Tr. 78). Concerning the store manager, District Judge Perry stated: "I think it is only fair for the court to say, frankly speaking, that I was not convinced at all in the case. I was convinced that the poor fellow was scared to death of his job." (Tr. 236.)

Concerning the testimony of the plaintiff, District Judge Perry found:

> When plaintiff appeared in court in this cause, she appeared upon a stretcher, attended by a nurse and other attendants. It was obvious that plaintiff was suffering considerable pain; and in view of this fact, her apparent weakness and advanced age, it would have been unwise to permit an extended cross-examination, in view of the very brief direct examination of the plaintiff. *The court is convinced that the plaintiff told the truth in describing the accident and in stating that she was struck by the door while at the threshold of the door, and the court is convinced that the plaintiff, at and before said accident, was exercising ordinary care for her own safety and that she was injured due to the negligence of the defendant.* (Tr. 255)

In spite of these clear determinations of the credibility of these two *and only* occurrence witnesses, the Court of Appeals, in its opinion, (1) considered as true the testimony of the store manager, stating, "We have the positive evidence of the store manager who said that he picked the plaintiff up from the public sidewalk in front of the

store where she was lying a short distance from the building line of the store"; and (2) considered as untrue the testimony of plaintiff.

Thus, the Court of Appeals (not even referring or paying lip service to Rule 52), chose to believe the store manager whom the District Judge did not believe, and to disbelieve the plaintiff whom the District Judge did believe.

Plaintiff was required to come into the federal court because of the historical fiction of diversity of citizenship. Actually, Jewel Tea Co. is an Illinois corporation. It does all of its business in Illinois. Because it chose to obtain a charter from another state (probably for tax purposes, or for some other corporate management purpose) plaintiff had to come into the federal court to seek redress (otherwise defendant would have removed).

We are confident the Illinois state courts of appeal would have affirmed the judgment unhesitatingly. Mrs. Ernst, 80 years of age, paralyzed and crippled from being struck by defendant's door, has the experience of having a United States Court of Appeals reverse her judgment, upon the flimsy pretext that she was "confused." Of course she was confused after over a year of paralysis and having to testify from a stretcher while in great pain.

If this were an F. E. L. A. case, this Court no doubt would be most aggravated by, if not aghast at, the decision of the Court of Appeals, and would unhesitatingly grant redress, as it has had occasion to do with the Seventh Circuit on many prior occasions. Because this is not an F. E. L. A. case, but an ordinary negligence case, the question is whether the Court of Appeals, in non-F. E. L. A. injury cases, may remain immune to review by this court, and remain disdainful of this rule of this Court: "Findings of fact shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

If so, there may as well be no limitation of power upon the Court of Appeals, as it may invoke or disregard this rule at will, and plaintiffs are and shall remain without any remedy in fact—thus resulting in denial of due process of law.

This Court has been solicitous for the welfare of injured persons who sue in the Federal Courts under the F. E. L. A., Jones Act, etc. We respectfully submit this plaintiff is entitled to equal rights, if this Court agrees that the Court of Appeals committed grave error in this case.

II.

The defendant's store manager testified three different times he made out a written report in long hand immediately following the occurrence; that he signed it and transmitted it through normal channels to defendant's main office (Tr. 69, 73). The record discloses that repeatedly throughout the trial, plaintiff requested and the court ordered that this report be brought to the courthouse. (Tr. 11, 13, 71, 72, 74, 75, 145, 152, 154, 155, 168, 169, 170, 176, 178, 179, 192, 193.) Defendant's attorneys vigorously objected to all questions to its manager relating to the location of the report (Tr. 70).

During the trial, District Judge Perry (Tr. 17[illegible]7) said:

> "Genlemen, it is very difficult for a lawyer to try a case when his client has tied his hands. I am not at all convinced that the defendant does not have or has not had in its possession this instrument. I am going to give a great deal of consideration to a petition for contempt of the defendant company, Counsel, and I am going to continue this case for that purpose until

10:00 o'clock next Monday. *The laws of this court are not going to be flaunted by a corporation coming in here and making apparently a defense that is indefensible. This just does not make sense to me and I am not satisfied with it, and I am also ready to issue a search warrant, I am also ready to call in any witness you wish from the company. I feel very strongly on this point that there is something that is available that is being deliberately avoided. I FEEL VERY STRONGLY ON IT.*"

Following the trial, the District Judge made this finding:

"Defendant was directed by this court to produce a written report which the manager of the defendant's store repeatedly asserted on the witness stand under oath he had made out and sent in normal channels to the main office of the defendant. No adequate explanation was given for the failure of defendant to produce said statement at the trial, although directed by this court to do so. *The court is convinced that the defendant did not act in good faith in this respect and did not make an adequate or reasonable explanation for its failure to produce said report, and the court is convinced that said report was made, and were it produced, it would contain evidence against the defendant.* In making this finding, the court is not charging the particular trial attorneys, Albert M. Howard and his associate Edward Vorbeck, for the defendant with bad faith on their part, the Court finds that on the contrary said attorneys personally exercised the best of faith and that it was the defendant itself or its officers who did not adequately explain the failure to produce the said written report."

The Court of Appeals treated quite lightly the corporate defendant's contemptuous abuses of the processes of the District Court. Defendant wilfully refused to bring to court a report of the accident, which resulted in plaintiff's paralysis. The Court of Appeals says (Tr. 273):

"There was no evidence, however, from any source as to what the report contained."

Of course, *plaintiff* could not prove what was in the report, because she could not get to see the report. That is the basis for the rule that wilful refusal to produce vital evidence raises a presumption against the party refusing to produce such evidence.

Yet the Court of Appeals would cast the burden upon *plaintiff* to prove what was in a report of *defendant* which neither she nor her counsel ever saw, and which the District Judge expressly found was wilfully concealed by defendant.

Surely it would tax the credulity of the most naive to believe that Jewel Tea Co. and its insurance carrier would lose a vital report of an important accident. This Court knows that a report such as this would be copied and recopied many times and transmitted to the insurance carrier, to their investigators, etc. Yet this corporate defendant was able to flaunt the processes of the District Court and to refuse to produce its report of the accident or any copies thereof, *although the District Judge expressly found wilful concealment.*

The question poses itself: What does a plaintiff have to do to obtain redress when the Seventh Circuit's Court of Appeals goes as far as it did in this case to absolve a corporate defendant from liability, in a simple negligence case tried without a jury, in which plaintiff recovered a judgment supported by clear, simple and concise findings of fact and conclusions of law.

The testimony is undisputed that the door involved in this case is *NOT* the same as electric eye doors generally throughout the country (Tr. 199). Yet, the Court of Ap-

peals went out of its way to insulate *ALL* electric eye door manufacturers, distributors and all retail stores or other places which use electric eye doors from any liability to any person who is injured by such a door. How can the Court of Appeals say this door and ALL ELECTRIC EYE DOORS ARE "SAFE AND GENTLE," when a lady lies paralyzed from being knocked down by the door, and when the UNDISPUTED testimony was that the door could strike a person who hesitated at a blind spot in the door with such force as to break her hip? (Testimony of Dr. Wendt, Tr. 40.)

III.

The defendant not only concealed its written report of the accident but concealed witnesses as well.

A witness for the plaintiff, John Kroell, testified there were witnesses; that he was told this by an agent of Jewel Tea Co., namely, a Mr. Spencer. He named Spencer twice. Spencer did not testify. Mr. Kroell was not contradicted or impeached. The testimony stands undisputed.

The Court directed the defendant to name its witnesses in accordance with the discovery rules of this Court. Defendant refused, just as it refused to produce its report of the accident. The Court of Appeals, again believing the testimony of the store manager, *whom the trial court expressly did not consider credible,* states that because Bickel stated there were no witnesses, that must have been the fact. *The Court of Appeals did not even mention the testimony of Mr. Kroell, which remains unimpeached, uncontradicted and undisputed.*

This question presents itself: May a corporate defendant and its insurance carrier wilfully refuse to disclose witnesses in the District Courts of the Seventh Circuit, in direct opposition to the orders for discovery of a District Judge?

CONCLUSION.

Defendant cleverly has filed a 31-page brief and has cited 28 irrelevant authorities, the obvious purpose of which is to impel this Court to deny the petition for certiorari, by plausibly, but unsoundly, misleading this Court into thinking that this case was involved as to the facts and the law, and thus is not within the scope of Rule 38 (5) (b), which says that this Court will grant review only when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

We respectfully submit that it was never intended by our Constitution that the Courts of Appeal would be final judicial authority on all diversity cases, simply because no Federal Statute is directly involved.

We recognize the necessary predisposition of this Court to avoid granting certiorari merely to cure an injustice of a Court of Appeals, and that this Court has before it cases of great impact on the economic and social welfare of the people of this country.

Nonetheless, small cases dollarwise may evidence a pattern which must be corrected.

We respectfully petition this Court to grant certiorari to correct so flagrant a departure by the Seventh Circuit's Court of Appeals from every historical concept of the power of an appellate tribunal.

This case presents a simple, yet ideal, vehicle for an expression by this Court covering the usurpation of power by that Court.

We have respectfully stated why we earnestly request this Court to grant certiorari.

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